

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

DANIEL J. DENNEHY,

Plaintiff

V.

CIVIL 04-1899 (JAG)

WALTER B. FRAMBES, et al.,

Defendants

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This matter is before the court on motion to dismiss filed by the defendants Walter B. Frambes, Aline Frambes Buxeda, Jessica Frambes Buxeda and Janine Frambes Buxeda (hereinafter “defendants”) pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, for lack of subject matter jurisdiction and for failure to state a claim respectively. (Docket No. 24, December 27, 2004.) Plaintiff, Daniel J. Dennehy (hereinafter “Dennehy”), filed a memorandum of law in opposition to defendants’ motion to dismiss on January 24, 2005. (Docket No. 29.) The matter was referred to me for a report and recommendation on March 9, 2005 (Docket No. 45), and now, having considered the arguments of the parties and the applicable law, it is my recommendation that defendants’ motion to dismiss be DENIED.

1. FACTUAL AND PROCEDURAL BACKGROUND

This is a diversity action filed by Dennehy in which he requests, among other things, a temporary restraining order, preliminary and permanent injunction. He

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3 moves the court to order the defendants to refrain from acting as representatives in
 4 both law and fact of Vencedor Development Corporation in the case of Vencedor
 5 Development Corp., et al v. Autoridad de Carreteras de Puerto Rico, et al., Civil No.
 6 D AC1977-0621, which is being litigated in the Commonwealth of Puerto Rico Court
 7 of First Instance, Bayamón Part. Dennehy also appears to be seeking a declaration
 8 by the court of his entitlement to a little over 19% of the proceeds that the above
 9 described litigation might produce. The following are the allegations made by
 10 Dennehy in support of the request for injunctive and declaratory relief.

12 Dennehy, a resident of 307 Bridge Brook, Wexford, PA 15090, and citizen of
 13 the Commonwealth of Pennsylvania, maintains that on January 27, 2000, co-
 14 defendant Walter B. Frambes issued a letter addressed to Daniel J. Dennehy-Ward¹
 15 which reads:

17 This is to confirm that your compensation for
 18 assuming the position of vice President of Vencedor
 19 Corporation to supervise the pending litigation until its
 20 final resolution will be nineteen and one sixth percent (19
 1/6%) from which payment of one half of the expenses
 21 incurred for the litigation will be paid.

22 (Docket No. 27, Attach. 2, at 7, Ex. 2.) On May 19, 2000, Dennehy-Ward and
 23 Walter B. Frambes executed another document titled "Consent in Lieu of Meeting."
 24 Said document reads in pertinent part as follows:

25 RESOLVED, that Mr. Daniel J. Dennehy[-Ward] be and is
 26 hereby ratified as Vice President of the Corporation with

27 ¹I will refer to the father as "Dennehy-Ward" and will use "Dennehy" when
 28 making reference to the son, who is the plaintiff in this case.

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3 full authority to act for the corporation with respect to the
4 pending litigation in return for receipt with preference
5 over other obligations of the corporation of nineteen and
one half percent of the total amount recovered in the
pending litigation.

6 (Docket No. 27, Attach. 2, at 9, Ex. 4.) However, on July 24, 2003, Walter B.
7 Frambes issued a Corporate Resolution stripping Dennehy-Ward of his share in the
8 proceeds to be recovered in the Vencedor Development litigation and of any and all
9 powers conferred to Dennehy-Ward with respect to the corporation. (Docket No. 27,
10 Attach. 3, at 5.) According to said Corporate Resolution, all the powers given to
11 Dennehy-Ward by virtue of the May 18, 2001² resolution were revoked. (Id.)
12 Walter B. Frambes made reference to some alleged irregularities and actions on the
13 part of Dennehy-Ward which he claimed prejudiced the corporation and the
14 litigation being conducted in the Bayamón court. (Id.) The resolution accused
15 Dennehy-Ward, *inter alia*, of having made certain money transfers without
16 informing Walter B. Frambes and of using the Corporation's bank account as his
17 own personal account. (Id.) Finally, the resolution effectively separated Dennehy-
18 Ward of all the positions held and all the functions performed in relation to
19 Vencedor Development Corporation. (Id.)
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²On May 18, 2001, Walter B. Frambes issued a resolution designating
27 Dennehy-Ward as sole manager and administrator of the corporation's affairs with
28 full power to represent the corporation as if he were the President, Chief Executive
Officer and Treasurer of the corporation. (Docket No. 27, Attach. 2, at 10, Ex. 5.)

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3 In February of 2004, Dennehy-Ward moved to Florida. Such a fact is
4 evidenced, according to Dennehy, by Dennehy-Ward's checking account statement
5 for the months of May-June of 2004. (Docket No. 27, Attach. 5.) The statement
6 lists Dennehy-Ward's address as 11 Lagos del Norte, Fort Pierce, Florida, 34951-
7 2867. (Id.) Moreover, the statement shows almost daily ATM transactions within
8 the state of Florida. (Id.)

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10 On July 1, 2004, Dennehy and Dennehy-Ward executed a document titled
11 "Assignment and Acceptance Agreement." In it, Dennehy-Ward assigned to his son
12 Dennehy, "all of the right[s], title obligation and interest ... in any and all debt or
13 obligation under contracts or agreements or by virtue of extra-contractual
14 obligations owed to him and/or which [Dennehy-Ward] is the potential owner and/or
15 ... has or may have a claim." (Docket No. 27, Attach. 2, at 4, Ex. 1, ¶ 1.) The
16 agreement also gave Dennehy the right to bring any actions, administrative or
17 judicial, in order to enforce the assigned rights and gave him the discretion to
18 dispose of the same, or of the property acquired by virtue of the assigned rights.
19 (Id.) Eventually, Dennehy-Ward moved to an assisted living community called "The
20 Place at Vero Beach." He died on October 13, 2004. His death certificate states that
21 at the time of death he was a resident of 3855 Indian River Boulevard, Vero Beach,
22 Indian River, Florida, 32960. (Docket No. 27, Attach. 6.)
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25 The defendants now seek dismissal of Dennehy's complaint requesting
26 injunctive and declaratory relief on the grounds that the court lacks subject matter
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3 jurisdiction. Specifically, it is defendants' position that there is no complete
4 diversity between the parties and that the amount-in-controversy requirement for
5 diversity jurisdiction is not met in this case. According to them, there is no
6 complete diversity between Dennehy and the defendants because a service by
7 publication made in a Puerto Rico newspaper as part of a separate state lawsuit
8 indicated that the last known address of Dennehy-Ward was Parkville, Guaynabo,
9 Puerto Rico.³ Furthermore, the defendants argue that even if diversity is found,
10 Dennehy cannot meet the jurisdictional amount of \$75,000.00 set forth in 28 U.S.C.
11 § 1332. In defendants' opinion, from either plaintiff's or defendants' point of view
12 as to the value of the object of litigation, the jurisdictional amount is not met
13 because the potential damage to Dennehy is speculative and unpredictable at best.
14 The defendants submit that the value of the damages is speculative because there has
15 been no judgment in the underlying litigation that is the object of the present case,
16 and that even after the case goes to trial (the action was filed in 1977) and all the
17 appeals are exhausted, there is no indication that the defendants will refuse to give
18 Dennehy his share of the proceeds. The defendants also argue that this court should
19 not intervene because the controversy is not ripe for the issuance of declaratory
20 relief and that the requirements for the issuance of a preliminary injunction cannot
21 be met by Dennehy.
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26 ³The defendants contend that the real plaintiff in the case is Dennehy-Ward
27 inasmuch as all the allegations in the complaint relate to him and not to his son and
28 that Dennehy is trying to create diversity jurisdiction where none exists by using his
Pennsylvania address instead of that of his father who is the real plaintiff.

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3 Dennehy opposes defendants' motion claiming that he is the real party in

4 interest in this case by virtue of the agreement entered into with his father Dennehy-

5 Ward whereby the latter assigned his interest in the underlying litigation to the

6 former. Alternatively, Dennehy maintains that even if his father is deemed the real

7 party in interest, the court still has jurisdiction since his father had become a

8 domicile of the state of Florida. Finally, Dennehy contends that the matter in

9 controversy in this case exceeds the jurisdictional amount of \$75,000 inasmuch as

10 his interest in the Vencedor litigation could be worth more than \$800,000.

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II. STANDARD OF REVIEW

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14 Federal Rule of Civil Procedure 12(b)(1) provides for the dismissal of a case

15 if the court lacks jurisdiction over the subject matter. Fed. R. Civ. P. 12(b)(1).

16 "Because federal courts are courts of limited jurisdiction, federal jurisdiction is

17 never presumed." Viqueira v. First Bank, 140 F.3d 12, 16 (1st Cir. 1998). On the

18 contrary, what the court must presume is that federal jurisdiction is lacking until

19 otherwise established. See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375,

20 377 (1994). The burden is on the party asserting federal jurisdiction to

21 demonstrate that such jurisdiction exists. Aversa v. United States, 99 F.3d 1200,

22 1209 (1st Cir. 1996) (citing Murphy v. United States, 45 F.3d 520, 522 (1st Cir.

23 1995)). The complaint must be construed liberally, treating the well-pleaded facts

24 as true and indulging all reasonable inferences in favor of the plaintiff. Viqueira v.

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3 First Bank, 140 F.3d at 16 (citing Royal v. Leading Edge Prods., Inc., 833 F.2d 1, 1
4 (1st Cir. 1987)).

III. APPLICABLE LAW AND ANALYSIS

A. Subject Matter Jurisdiction: Diversity

8 The issue before the court is whether Dennehy has carried his burden of
9 showing that this court has jurisdiction over the subject matter of this action under
10 28 U.S.C. § 1332(a)(1). Said subsection provides in relevant part that

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$ 75,000, exclusive of interest and costs, and is between--

(1) Citizens of different States⁴

15 || 28 U.S.C. § 1332(a)(1).

16 As the statute makes clear, a federal district court has original jurisdiction in
17 all civil cases where the matter in controversy exceeds the sum of \$75,000 and there
18 is diversity of citizenship. Stewart v. Tupperware Corp., 356 F.3d 335, 337 (1st Cir.
19 2004). It is up to the party asserting jurisdiction to show by a preponderance of the
20 evidence that both requirements were met at the time the complaint was filed. See
21 García-Pérez v. Santaella, 364 F.3d 348, 350-51 (1st Cir. 2004) (“The key point of
22 inquiry is whether diversity of citizenship existed at the time the suit was filed[.]”);
23 Coventry Sewage Assocs. v. Dworkin Realty Co., 71 F.3d 1, 4 (1st Cir. 1995)
24 (explaining that to determine if the amount-in-controversy requirement is met, the
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⁴For purposes of this subsection, the word "States" includes the Commonwealth of Puerto Rico. 28 U.S.C. § 1332(e).

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3 court must look at the circumstances as they existed at the time the complaint was
4 filed). I analyze both requirements separately keeping in mind that if the court
5 finds plaintiff's showing wanting as to anyone of them, the complaint must be
6 dismissed for lack of jurisdiction.

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1. Citizenship

9 As stated, federal jurisdiction based on diversity requires a matter in
10 controversy to be between citizens of different states. Bank One, Tex., N.A. v.
11 Montle, 964 F.2d 48, 49 (1st Cir. 1992). For purposes of diversity, citizenship is
12 usually equated with domicile. Valentín v. Hosp. Bella Vista, 254 F.3d 358, 366 (1st
13 Cir. 2001); Lundquist v. Precision Valley Aviation, Inc., 946 F.2d 8, 10 (1st Cir.
14 1991); Rodríguez-Díaz v. Sierra-Martínez, 853 F.2d 1027, 1029 (1st Cir. 1988). "A
15 persons' domicile[, in turn,] 'is the place where he [or she] has [a] true, fixed home
16 and principal establishment, and to which, whenever he is absent, he has the
17 intention of returning.'" Rodríguez-Díaz v. Sierra-Martínez, 853 F.2d at 1029
18 (quoting 13B Charles Alan Wright et al., Federal Practice & Procedure § 3612, at 526
19 (1984)). Domicile implicates physical or actual presence in a place with the intent
20 to remain there indefinitely. See Bank One, Tex., N.A. v. Montle, 964 F.2d at 53; see
21 also Hawes v. Club Ecuestre El Comandante, 598 F.2d 698, 701 (1st Cir. 1979)).
22 Several factors are taken into account in analyzing a party's ties to a particular
23 domicile.

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While it is impossible to catalogue all factors bearing on the
issue, they include the place where civil and political rights

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3 are exercised, taxes paid, real and personal property (such
4 as furniture and automobiles) located, driver's and other
5 licenses obtained, bank accounts maintained, location of
6 club and church membership and places of business and
employment.

7 Lundquist v. Precision Valley Aviation, Inc., 946 F.2d at 11-12; see also García-Pérez
8 v. Santaella, 364 F.3d at 351. No single factor is controlling and the analysis cannot
9 focus on the number of contacts with the purported domicile but also on their
10 substantive nature. Id.

11 I start this discussion by pointing out that the existence of diversity of
12 citizenship can be challenged in two ways. First, there could be a challenge where
13 the defendant accepts plaintiff's version of the facts supporting jurisdiction as true
14 but attacks their sufficiency ("sufficiency challenge"). Valentín v. Hospital Bella
15 Vista, 254 F.3d at 363. The second way to mount a jurisdictional challenge "is by
16 controverting the accuracy (rather than the sufficiency) of the jurisdictional facts
17 asserted by the plaintiff and proffering materials of evidentiary quality in support
18 of that position" (factual challenge). Id. When presented with a sufficiency
19 challenge, the court must credit plaintiff's well-pleaded factual allegations and draw
20 all reasonable inferences from said allegations in plaintiff's favor to dispose of the
21 challenge. Id. (citations omitted). On the other hand, when resolving a factual
22 challenge, "the plaintiff's jurisdictional averments are entitled to no presumptive
23 weight [and] the court must address the merits of the jurisdictional claim by
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 3 resolving the factual disputes between the parties." *Id.* (citing *García v. Copenhaver*,
 4 Bell & Assocs., 104 F.3d 1256, 1261 (11th Cir. 1997)).

5 In this case, the defendants appear to be mounting a factual challenge to
 6 Dennehy's jurisdictional averments. But their challenge is not the typical attack
 7 on the accuracy of the facts alleged by Dennehy in support of his claim of complete
 8 diversity. The defendants do not dispute that plaintiff Dennehy (as opposed to his
 9 father Dennehy-Ward) is a citizen of the Commonwealth of Pennsylvania. The
 10 defendants argue, however, that Dennehy is not "the real party in interest" in this
 11 action since the allegations in the complaint relate exclusively to his father
 12 Dennehy-Ward. Claiming that Dennehy-Ward was domiciled in Puerto Rico at the
 13 time this lawsuit was commenced,⁵ the defendants maintain that the court lacks
 14 subject matter jurisdiction over this case for there is no complete diversity.

15 In opposition, Dennehy contends that the defendants are trying to destroy
 16 complete diversity in this case by unilaterally deeming Dennehy-Ward as the real
 17 party in interest. Dennehy maintains that his father Dennehy-Ward is neither the
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24 ⁵The defendants attempt to support their claim that Dennehy-Ward was
 25 domiciled in Puerto Rico making reference to a certain Service by Publication
 26 published in *El Vocero* on October 23, 2004 where an address in Guaynabo, Puerto
 27 Rico was listed as the last known address of Dennehy-Ward. Despite defendants
 28 indication that such Service by Publication was included in their motion to dismiss
 as Exhibit 1, the same was not attached to the motion. In any event, such evidence
 by itself does not necessarily prove that Dennehy-Ward's did not acquire a new
 domicile.

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 3 real party in interest in this case nor a resident⁶ of Puerto Rico. He submits that on
 4 July 1, 2004, he and his father executed in Florida a document titled "Assignment
 5 and Acceptance Agreement" in which Dennehy-Ward allegedly assigned to Dennehy,
 6 among others, his interest in the Vencedor litigation. Such document shows,
 7 according to Dennehy, that it is he who is the real party in interest in this case.
 8 Because there was complete diversity between him and all the defendants at the time
 9 the complaint was filed, Dennehy maintains that defendants' motion to dismiss for
 10 lack of subject matter jurisdiction should be denied. In the alternative, it is
 11 Dennehy's position that even if his father is deemed the real party in interest in this
 12 case, that complete diversity still exists because his father was a citizen of the State
 13 of Florida at the time the complaint was filed.

16 After reviewing the arguments of the parties and the evidence in the record,
 17 I find that the real party in interest in this case is Dennehy and not his father
 18 Dennehy-Ward. In the complaint, Dennehy identified himself as the plaintiff and
 19 alleged to be "of legal age, resident of 307 Bridge Brook Wexford, PA 15090, and
 20 citizen of the Commonwealth of Pennsylvania." (Docket No. 1.) Contrary to
 21 defendants' contention, he is the plaintiff with an interest in prosecuting this case
 22 by virtue of the agreement entered into between him and his father. In said

25 ⁶Dennehy refers to the concept of residency as if it would be the equivalent of
 26 the concept of domicile. Such reference is clearly incorrect since residency alone is
 27 insufficient to confer diversity jurisdiction. Valentín v. Hosp. Bella Vista, 254 F.3d
 28 at 361 n.1. ("Jurisdictionally speaking, residency and citizenship are not
 interchangeable.") I assume that when he refers to residency, he means domicile
 for purposes of this discussion.

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3 document, titled “Assignment and Acceptance Agreement,” Dennehy-Ward assigned
4 to his son Dennehy, “all of the rights, title obligation and interest ... in any and all
5 debt or obligation under contracts or agreements or by virtue of extra-contractual
6 obligations owed to him and/or which [Dennehy-Ward] is the potential owner and/or
7 ... has or may have a claim.” (Docket No. 27, Attach. 2, at 4, Ex. 1.) Although the
8 allegations in the complaint relate to the rights originally acquired by Dennehy-Ward
9 to control the Vencedor litigation and to recover 19% of the award, said interest was
10 assigned to Dennehy in July 1, 2004. Therefore, without entering into the validity
11 and legality of such assignment, it is clear that Dennehy is the real party with an
12 interest to regain control of the Vencedor litigation.
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15 Having so concluded, it follows that there is no challenge to either the
16 sufficiency or accuracy to the allegation made by Dennehy that at the time he filed
17 the complaint he was a citizen of the Commonwealth of Pennsylvania. Consequently,
18 there is complete diversity between the parties. As to this issue, defendants’ motion
19 must be DENIED.
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21 2. Jurisdictional Amount

22 The defendants argue that since the relief requested in this case is equitable
23 and declaratory in nature, that the potential monetary implications in this case are
24 speculative and unpredictable at best. They also argue that Dennehy’s contention
25 regarding the jurisdictional amount is simply an allegation of his entitlement to 19%
26 of the award recovered in the Vencedor litigation which he estimates to be worth
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3 over \$1,000,000. But according to the defendants, there is no real monetary
4 interest in this case because there is no judgment in the underlying litigation and
5 even after the case goes to trial and a final judgment obtained, there is no indication
6 that the defendants will refuse to give Dennehy his share of the proceeds. Therefore,
7 it is defendants' position that it is a legal certainty that Dennehy's claim is for less
8 than \$75,000.

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10 Dennehy ripostes that in accordance with a draft of an expert report prepared
11 by Diego Chévere, CPA, CMC, CVA, the value to defendants of the Vencedor litigation
12 was \$4,515,943 by March 26, 2003. Because Dennehy maintains that he is entitled
13 to a little over 19% of whatever is recovered in said litigation, the value of his
14 interest is estimated in approximately \$880,608.97, an amount obviously exceeding
15 the jurisdictional amount set forth in 28 U.S.C. § 1332(a).
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17 As the party seeking to invoke the jurisdiction of the court, Dennehy also
18 bears the burden of alleging with sufficient particularity the facts that would allow
19 the court to determine that it is not a legal certainty that his claim is for less than
20 \$75,000. Spielman v. Genzyme Corp., 251 F.3d 1, 5 (1st Cir. 2001); Dept' of
21 Recreation & Sports v. World Boxing Ass'n, 942 F.2d 84, 88 (1st Cir. 1991). "In
22 actions seeking declaratory or injunctive relief, it is well established that the amount
23 in controversy is measured by the value of the object of the litigation." Hunt v.
24 Wash. State Apple Adver. Comm'n, 432 U.S. 333, 347 (1977). Generally, the value
25 of the object of litigation is measured from plaintiff's perspective. See Ferris v. Gen.
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3 Dynamics Corp., 645 F. Supp. 1354, 1362 (D.R.I. 1986). In other words, where the

4 remedy sought is an injunction, “the ‘amount in controversy’ has historically been

5 calculated by assessing the value to the plaintiffs of conducting their affairs free

6 from the restriction or imposition which they seek to restrain.” Id. (citations

7 omitted). Nevertheless, courts and commentators alike have recognized a clear

8 trend to sanction jurisdiction where the amount in controversy requirement is

9 satisfied from “either party” or “defendants” viewpoint. Grotzke v. Kurz, 887 F.

10 Supp. 53, 55-56 (D.R.I. 1995) (citing 1 James W. Moore, et al., Moore’s Federal

11 Practice ¶ 0.9[1], at 820 (2d ed. 1995)).

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14 In this case, what Dennehy is seeking to restrain by requesting an injunction

15 is defendants’ control of the Vencedor litigation. Dennehy bases his request in the

16 need to regain control of said litigation in order to preserve his interest in the

17 outcome, which in turn can be endangered by the choice of legal representation

18 selected by the defendants and by any other mishandling of the litigation. Assuming

19 without deciding that Dennehy’s claim is actionable and that he is entitled to the

20 relief requested because the grounds asserted by him are legally and procedurally

21 sound, it follows that he has carried his burden of showing that it is not a legal

22 certainty that his claim is for less than the jurisdictional amount. He submitted a

23 draft of an expert report prepared by Diego Chévere, CPA, CMC, CVA, on March 26,

24 2003 in which the latter estimated the loss profits and damages resulting from the

25 corporation’s lack of use of land as allegedly prevented by the government of Puerto

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3 Rico. (Docket No. 27, Attach. 8.) In it, the expert calculated an estimated loss of
4 \$2,121,218.86 with additional interest of \$2,394,724.76 as of August 25, 1995.
5 Such damages are sought to be recovered in the Vencedor litigation. Since Dennehy
6 claims to be entitled to 19% of any such damages recovered, his share of the
7 proceeds can certainly be estimated in over \$800,000. Thus, under either party's
8 viewpoint, it is not a legal certainty that the object of this litigation is less than the
9 jurisdictional amount. See Giangrande v. Shearson Leahman/E.F. Hutton, 803 F.
10 Supp. 464, 466 (D. Mass. 1992) (noting that in attempting to establish the
11 jurisdictional amount, a plaintiff is entitled to rely on the actual or threatened
12 injury). As to this issue, I recommend that defendant's motion to dismiss for lack
13 of subject matter jurisdiction be DENIED.

16 B. Ripeness

17 Next I address defendants' contention that since Dennehy's claim involves a
18 threat of future injury, the case is not ripe for the issuance of a declaratory
19 judgment as required by the Constitution "case and controversy" requirement of
20 Article III. Specifically, the defendants argue that the alleged threatened injury is
21 not concrete or immediate. According to the defendants, Dennehy seeks a
22 declaration by the court of his entitlement to 19% of zero. This is so because no
23 judgment has been obtained, the case has not gone to trial, the lawsuit has taken
24 almost thirty years and even if it goes to trial and after all appeals are exhausted, the
25 defendants have yet to renege on Dennehy's 19% share. In sum, it is defendants'
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3 contention that Dennehy's injury in this case is only hypothetical, speculative and
4 conjectural.

5 Dennehy responds that the defendants incorrectly identify this case as a suit
6 requesting declaratory relief. Thus, in Dennehy's opinion, it is irrelevant to discuss
7 whether the present claim is ripe. More specifically, Dennehy maintains that the
8 defendants already reneged his share and what he is seeking is a determination by
10 the court which would force the defendants to relinquish their claim over his share.
11 Since the claim for a share of the proceeds has an executory part, Dennehy argues
12 that it is not a claim for declaratory relief, rather it is a claim springing from
13 defendants' breach of contract with his father Dennehy-Ward.
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15 It is well settled that Article III of the United States Constitution confines
16 federal courts to the adjudication of "cases" and "controversies." Allen v. Wright,
17 468 U.S. 737, 750 (1984). Thus, federal courts can only decide what is referred to
18 as "live grievance[s]." Am. Postal Workers Union v. Frank, 968 F.2d 1373, 1374
19 (1st Cir. 1992). Like the concept of standing, ripeness has its roots in Article III's
20 case and controversy requirement and in prudential considerations. Mangual v.
21 Rotger-Sabat, 317 F.3d 45, 59 (1st Cir. 2003) (citing R.I. Ass'n of Realtors, Inc. v.
22 Whitehouse, 199 F.3d 26, 33 (1st Cir. 1999)). For a case to ripe for adjudication
23 there has to be a "substantial controversy, between parties having adverse legal
24 interests, of sufficient immediacy and reality to warrant the issuance of a
25 declaratory judgment." Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 506
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3 (1972). “The ripeness doctrine seeks ‘to prevent the courts, through avoidance of
4 premature adjudication, from entangling themselves in abstract disagreements.’”
5 McInnis-Misenor v. Me. Med. Ctr., 319 F.3d 63, 70 (1st Cir. 2003) (quoting Abbott
6 Labs. v. Gardner, 387 U.S. 136, 148 (1967)).
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8 Determining ripeness involves a dual inquiry. McInnis-Misenor v. Me. Med.
9 Ctr., 319 F.3d at 70. First, the court must determine whether the issue is fit for
10 review. Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 535 (1st Cir.
11 1995). This determination involves subsidiary queries concerning finality,
12 definiteness and the extent to which resolution of the challenge depends upon facts
13 that may not yet be sufficiently developed. Id.; see also Stern v. United States Dist.
14 Court, 214 F.3d 4, 10 (1st Cir. 2000). The critical question in the fitness analysis
15 is “whether the claim involves uncertain and contingent events that may not occur
16 as anticipated or may not occur at all.” Ernst & Young v. Depositors Econ. Prot.
17 Corp., 45 F.3d at 536 (quoting Mass. Ass’n of Afro Am. Police, Inc. v. Boston Police
18 Dep’t, 973 F.2d 18, 20 (1st Cir. 1992)). The second prong of the test refers to the
19 hardship the parties may suffer if the court withholds consideration of the
20 controversy. This prong is entirely prudential. McInnis-Misenor v. Me. Med. Ctr.,
21 319 F.3d at 70. The court must evaluate the extent to which withholding judgment
22 will create a direct and immediate dilemma for the parties and whether plaintiff is
23 suffering any present injury from a future contemplated event. Id. (citations
24 omitted). “The greater the hardship, the more likely a court will be to find
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3 ripeness.” Id. (citing Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d at
4 536).

5 Here, Dennehy attempts to avoid the ripeness analysis altogether by arguing
6 that the relief requested in the complaint with respect to his 19% share was not
7 declaratory in nature, but “spring[ing] from defendants[’] breach of contract with
8 Dennehy-Ward.” (Docket No. 27, Attach. 1, at 33.) However, the complaint
9 specifically prays that the court “[r]ecognize Dennehy’s 19 1/2% share in any
10 proceeds that [the] Vencedor ... [litigation] may produce.” (Complaint, Docket No.
11 1, Attach. 1, at 6, ¶ 3.) In effect, the relief requested is a declaration by the court of
12 his entitlement to such share of the proceeds. In that sense, he cannot avoid the
13 ripeness analysis by characterizing his claim as one for breach of contract.

14
15 On the other hand, it does not appear that Dennehy’s claim is not ripe for
16 adjudication. Without entering into the merits of whether the relief requested
17 should be granted, it does not follow that the same is unfit for review. The
18 determination of Dennehy’s entitlement to 19% of the Vencedor litigation award is
19 not contingent on the outcome of said litigation or on any facts not yet developed.
20 It is more aptly described as a purely legal question that may or may not be resolved
21 in Dennehy’s favor after analyzing the evidence already in the record and the
22 evidence that may be produced at a trial on the merits if one becomes necessary.
23 Additionally, withholding consideration of the controversy may result in the
24 uncertainty of not having the parties’ rights clearly delineated for which they would
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 3 have to engage in further litigation once there is a judgment in the Vencedor
 4 litigation. Consequently, the claim is ripe for consideration although I express no
 5 opinion on Dennehy's entitlement to the relief requested. As to this issue,
 6 defendants' motion to dismiss should also be DENIED.
 7

8 IV. CONCLUSION

9 In view of the above, I recommend that defendants' motion to dismiss (Docket
 10 No. 24) be DENIED.

11 Under the provisions of Rule 72(d), Local Rules, District of Puerto Rico, any
 12 party who objects to this report and recommendation must file a written objection
 13 thereto with the Clerk of this Court within ten (10) days of the party's receipt of this
 14 report and recommendation. The written objections must specifically identify the
 15 portion of the recommendation, or report to which objection is made and the basis
 16 for such objections. Failure to comply with this rule precludes further appellate
 17 review. See Thomas v. Arn, 474 U.S. 140, 155 (1985), reh'g denied, 474 U.S. 1111
 18 (1986); Davet v. Maccorone, 973 F.2d 22, 30-31 (1st Cir. 1992); Paterson-Leitch Co.
 19 v. Mass. Mun. Wholesale Elec. Co., 840 F.2d 985 (1st Cir. 1988); Borden v. Sec'y of
 20 Health & Human Servs., 836 F.2d 4, 6 (1st Cir. 1987); Scott v. Schweiker, 702 F.2d
 21 13, 14 (1st Cir. 1983); United States v. Vega, 678 F.2d 376, 378-79 (1st Cir. 1982);
 22 Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980).

23
 24 At San Juan, Puerto Rico, this 12th day of May, 2005.
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 27 S/ JUSTO ARENAS
 28 Chief United States Magistrate Judge